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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ALDO ALEJANDRO GONZALEZ,

Defendant and Appellant.

DO52827

(Super. Ct. No. SCD190887)

APPEAL from a judgment of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Affirmed.

A jury convicted Aldo Alejandro Gonzalez of one count of first degree murder (Pen. Code,¹ § 187, subd. (a), 189). The jury also found true the allegations Gonzalez (1) personally used a firearm (§ 12022.5, subd. (a)); and (2) intentionally and personally discharged a firearm, causing death (§ 12022.53, subd. (d)).

¹ All further statutory references are to the Penal Code unless otherwise specified.

The court sentenced Gonzalez to a state prison term of 50 years to life, consisting of 25 years for the murder and an additional 25 years for discharging a firearm. The court stayed the sentence on the personal use allegation.

On appeal Gonzalez asserts (1) there is no substantial evidence to support the first degree murder conviction, (2) there is no substantial evidence to support the personal discharge of a firearm finding, (3) the court erred and violated his due process rights by refusing to instruct the jury on imperfect self-defense, and (4) the court erred and violated his rights to due process and a fair trial when it permitted the People to introduce prejudicial gang evidence. We affirm.

FACTUAL BACKGROUND

A. People's Case

1. The shooting

Thomas Tweedie belonged to a gang or tagging crew called the "Looney Mob." In addition to putting up graffiti, members of the Looney Mob fought and engaged in violent acts. The Varrio Clairemont gang was a rival of the Looney Mob.

Jordan Ingram hung around with members of the Looney Mob, including Tweedie, but was not a member himself. Near the end of 2004, Ingram was driving his car with two affiliates of the Looney Mob. One of the passengers believed he had spotted a Varrio Clairemont member. They got out of the car and beat him up. Ingram stole his cell phone.

About 25 minutes later, Ingram drove by a car with approximately six people in it. One of the passengers in Ingram's car yelled out, "West Side." Three people got out of

the other car and shot at and hit Ingram's car. Ingram drove away. Ingram later told friends belonging to the Looney Mob, including Tweedie, about the incident.

Ingram lived with his mother. Starting about a week prior to May 3, 2005, Tweedie stayed at Ingram's house.

Ernesto Arana, also known as "Flaco", and his brother Marco, also known as "Termite", lived approximately two-tenths of a mile from Ingram's house. They were members of Varrio Clairemont. Ernesto² drove a white Ford Ranger truck.

Gonzalez, also known as "Krow," was friends with Ernesto and Marco, and was also a Varrio Clairemont member.

On the afternoon of May 3, 2005, Tweedie, Ingram, and their friends Andrew Shaver and James Rachels, were at Ingram's house. That day Rachels and Shaver had used methamphetamine and smoked marijuana with Tweedie. Shaver had been awake for much of the previous two days.

At approximately 6:00 p.m. that evening, Ricky Martin and Joe Salas rode their bicycles to Ingram's house to look at a car belonging to Ingram's mother. After they arrived they smoked some methamphetamine and marijuana with Ingram. Martin and Salas had been "partying" for a couple of days, and Martin was high that evening. Thereafter, Ingram drove Martin and Salas to a storage unit where Martin had some methamphetamine.

² References to parties by their first names are for purposes of clarity only. We intend no disrespect.

Meanwhile, Tweedie and Rachels were outside Ingram's house talking. A white truck with about three people drove by. Tweedie stated, "There goes Clairemont . . . [t]hat's V.C." Rachels turned to look at the street and saw a white truck "creeping, like driving real slow" in front of the house. It came to a complete stop one house down from Ingram's.

Tweedie ran into the house. Shaver saw Tweedie come inside. Tweedie seemed "agitated." He went to the room he shared with Ingram and came back with .22-caliber rifle. He told Shaver that a white truck had driven by with members of Varrio Clairemont in it and he had thrown up the gang sign for West Side, which Varrio Clairemont would take for an insult. Shaver followed Tweedie outside.

By the time they joined Rachels outside, the truck was gone. Rachels saw the gun in Tweedie's hand. Rachels told him the gun was not necessary and that if the people in the truck came back they would fight them. Besides, Rachels had a knife. Tweedie replied that it was more serious than that. The look in Tweedie's eyes suggested he was prepared to use the gun if necessary.

Rachels insisted that Tweedie get rid of the gun. Tweedie set the gun up against the house between some shrubs.

About 15 minutes later, at approximately 9:30 p.m., Ingram, Martin and Salas returned from the storage facility. Tweedie seemed agitated and was looking down the street. He told Ingram he had seen Arana's truck drive slowly by with a couple of Varrio Clairemont members in it about five minutes earlier.

Ingram was scared that the Varrio Clairemont members "had come to finish the job they started when they shot at [his] car" Tweedie assured him that he didn't need to worry because he had a gun "outside with them." Ingram saw the rifle leaning against the house. Ingram went inside and Rachels followed shortly thereafter.

Shaver saw a group of what appeared to be five men coming down the street. Shaver sensed something was wrong and went inside to tell Rachels.

Martin and Tweedie remained outside chatting. Tweedie was facing the street and Martin was facing Tweedie. Tweedie suddenly seemed to be looking at something fearfully just beyond Martin. Martin saw the group out of the corner of his eye and turned to look at them. There were five or six Latino men moving quickly, purposefully, and in unison. Gonzalez was in front and appeared to be "steering the group." They walked around the rear of Ingram's car and "set up" at the foot of the driveway. Martin thought there was going to be a fist fight and assumed he would have to help Tweedie.

Then Tweedie suddenly yelled, "Oh, fuck," and twisted his body away as if to "pull something" from behind him or "lift something out from his back." Martin thought he may have been reaching for "a bag of pot." However, on cross-examination, Martin admitted to testifying at the preliminary hearing that when Tweedie twisted, he went to his left and swung something up from his hip, "as if to shoot," and that Tweedie at that time raised "the gun."

Martin saw all the men in the group raise their arms. He saw "the muzzle flash come out" of Gonzalez's arm. Martin saw the bullets strike Tweedie. The shots corresponded to the flashes coming from Gonzalez's arm. Gonzalez was no more than

five feet away from Martin when he fired his gun. Martin was looking right at Gonzalez because he was the closest and "most of the fire" was coming from him. Martin testified at trial that he was certain it was Gonzalez that shot Tweedie.

Tweedie fell onto Martin's backpack, which was lying nearby. The group then fled on foot. Martin grabbed his backpack and ran towards the front door screaming, "He's shot. He's shot. . . . He's dead."

Salas was right behind Martin and was just as scared. He had seen the group of Latinos with shaved heads walk up to the driveway right before he heard a popping sound and saw "gun flash."

During this time, Ingram was inside fixing a bottle for his baby, and Shaver had convinced Rachels to go outside with him because of the group of men he had seen coming down the street. As Rachels and Shaver went out the front door, Shaver heard voices demand in an aggressive way, "What's up." Shaver heard Tweedie respond, "West Side. Looney Mob." The group replied, "Clairemont Trese." Both Rachels and Shaver then heard three gunshots in rapid succession.

Rachels and Shaver ran back into the house. Rachels then crept back outside slowly. At first he could not see anything, but then he saw Tweedie lying face down in the front yard near the sidewalk. Rachels yelled out to Tweedie, but Tweedie only moaned in response. Rachels urged Tweedie to get up, but he was silent. He tried to get closer to Tweedie, but at that moment the police arrived and told him to get on the ground.

Meanwhile, Martin and Salas had grabbed their bikes and left. Martin was frightened of the shooters and did not want to be arrested for the drugs in his backpack. However, they got lost and ended up back at the house. An officer took Martin to the ground, believing he was the shooter because he had blood on him.

Tweedie's friends told police that when they last saw him, Tweedie did not have the rifle in his possession. Officers securing the scene found it on the front lawn near the sidewalk, several feet from Tweedie. The gun's safety was on.

An officer examined Tweedie and he still had a pulse, but his breathing was shallow. He was taken to a hospital, but died shortly thereafter. A blood test showed the presence of methamphetamine and marijuana in his system.

Tweedie was shot three times with a .38-caliber handgun. All three rounds were fired from the same gun. One bullet pierced his left arm and then travelled into his left chest. Another went through his upper left chest, crossed two ribs, punctured his aorta and right lung. The third bullet struck him in the lower back, travelled through his ribs then punctured his left lung. Either of the second and third wounds would have been fatal.

Shortly after the shooting a neighbor, Sheri Christman, was walking home from a friend's house with her son, Nicholas, when a group of five young men passed them, walking fast. Christman knew the Arana family, and she thought she recognized Marco Arana's voice when he said, "What's up," as they passed. After they had passed, one said to her son, who was good friends with the youngest Arana son, "Hey, Nick."

Gustavo Arana, the father of the Arana brothers, had a white Ford Ranger pickup. It belonged to a friend, but Mr. Arana was allowed to use it at will, and he allowed his sons to use it regularly. The truck was at his house the day of the shooting and his family had access to it.

Cynthia Arana, the Arana brothers' mother, testified Gonzalez was at her house that night and left with them to go to the store about an hour before the shooting. She insisted they were gone for only 10 minutes. Although at first she insisted they did not drive, she eventually admitted that the closest store was 10 minutes away by foot and they could not have gone by foot or bicycle. She admitted that the truck keys were available in the kitchen and she was not guarding them the whole time.

Cynthia Arana claimed Gonzalez and her sons returned home from the store before the shooting and were within her sight when the shots were fired. She said they came in the house afterward and were not at all excited. When the prosecutor confronted her with her statement to the police that they came running into the house excitedly after the shooting, she admitted that they ran in, but only to ask her if she heard the shots. She denied telling the police that they were excited.

2. Rosa Gonzalez

At approximately 7:00 a.m. the morning after the shooting, Rosa, Gonzalez's younger sister, was crying and "very sad" at school. Lori Schuman, a teacher's aide, asked Rosa what was wrong. Rosa asked Schuman if she had heard about the shooting the night before. Schuman replied that she had heard it on the news. Rosa told her, "It was my brother." Rosa said her family was "talking about needing to hide [Gonzalez]."

Rosa also named two Arana brothers by their gang monikers as being involved.

Schuman cautioned Rosa not to talk to anyone about the matter and walked her to class.

On the way, Rosa showed Schuman a letter she had written to her friend, Ana, about the shooting. The letter read as follows:

"Hey, wud up, Flaka. How you been? I hope good. I've been in a bad mood since yesterday cuz of what happened. Man, that shit is fucken stupid. Okay, this is how it all happened . . . [¶] A few months ago my brother had beat up Tommy [from] BR (Brown Ridaz) & none of them did nothing about it (the Brown Ridaz) but on Tuesday at 9:30 p.m. my brother Krow, Flako, Termite, Solo, and Pwee were cruising and they saw Tommy, all of the CLMT fools had guns at that time. [¶] So Tommy had said that he was gonna kill Krow & PWee. So my brother rolled da window down and I guess . . . el Krow and Flako shot him cuz . . . the 1st time they shot him the 2nd time they . . . my bother shot him in his chest, Flako then shot him another time making sure he was dead. That's what happened Tuesday."

As discussed above, "Krow" was Gonzalez's gang moniker, "Flaco" was Ernesto Arana's, and "Termite" was Marco Arana's. "PWee" was Gonzalez's younger brother, and "Solo" was another Arana brother.

The letter also described a subsequent encounter with members of the "Brown Riders," a rival gang to Varrio Clairemont, who went to Gonzalez's house to retaliate shortly after the shooting. Rosa bragged that she challenged and intimidated one of the gang's female members. The letter ended with Rosa asking Ana not to repeat its contents to anyone.

Rosa gave the letter to Ana, who gave it to a boy she knew, Jonathon Mendoza, who was in a rival gang to Varrio Clairemont that was friendly with the Looney Mob. Within a few days, police had the letter. When Rosa found out, she told Schuman that

she regretted writing the letter and that Gonzalez was upset with her for doing so. Later, when Gonzalez was arrested, Rosa cried and told Schuman she felt responsible for his arrest. She stated she would try to help her brother by denying she wrote the letter.

3. Police investigation

Police searched Gonzalez's room. It was covered with Varrio Clairemont graffiti, including Gonzalez's gang moniker, Krow. The phrase "Varrio Clairemont Trese" was written on his door. Police did not find any guns, ammunition, or gunshot residue. Police also impounded the white Ford Ranger pickup. They found fingerprints belonging to Marco Arana on the rearview mirror, but no prints matching those of Gonzalez.

Five days after the shooting, San Diego Homicide Detectives Jana Beard and Anthony Johnson went to Rosa's school to interview her. Rosa seemed curious and a bit nervous, but not frightened or intimidated. She appeared willing to be interviewed and was "very congenial" during the interview.

Initially, Rosa told detectives she ""d[id]n't know anything." But when police confronted her with her letter, she became more forthcoming. Rosa said that on the night of the shooting, Gonzalez came home late and "acting aggressive." He knocked on the door and yelled to be let in. When he got inside, he acted "really, really, weird." He acted excited, but also scared. He said he and Ernesto Arana "shot the guy." He told her the shooting was payback for a previous fight.

Rosa said she wrote the letter to Ana the following day. She said the letter was her understanding of what happened, but admitted to embellishing it to make it sound more dramatic.

Rosa was also interviewed by the detectives at the police station. Rosa told police that when Gonzalez came home the night of the shooting, she heard him talking on the phone. Gonzalez was excited and said, "Hey dude guess what happened!" and "[O]h yeah we shot this guy . . . " [and] "me and Flaco had a gun" Yeah we saw the one dude last night and we shot him and I don't know what happened to him. If he is dead or something" She heard him on another call talking about confronting the victim and saying, "[F]uck BR." The person responded, "[F]uck Clairemont," so they shot him. Gonzalez did not mention anything about the victim having a gun. She also heard him bragging about the shooting a few days later with Ernesto Arana. Ernesto said to Gonzalez, "[D]o you remember when I passed the gun to you and you shot and just left." Rosa also told the police that Gonzalez went to his godmother's house the day after the shooting and "holed up" there, refusing to venture outside for any reason.

Gonzalez was brought in to be interviewed while Rosa was still at the station. Gonzalez denied any involvement in the shooting. He also denied being a member of Varrio Clairemont, although he admitted he used to claim membership in the gang. He claimed not to know the Arana brothers' gang monikers, but then understood and responded to questions using those monikers.

Midway through the interview, the detectives left the room and allowed Rosa to go inside with her brother. Gonzalez immediately told her not to say anything "because [of] the camera" He tried to direct her to say the letter was not hers. He then told Rosa, "If they ask you something else, you don't know anything. Do you understand?"

Detective Johnson reentered the room and, after sending Rosa outside to her parents, resumed the interview. Gonzalez admitted he was with Ernesto and Marco Arana the night of the shooting. At first he said that he was at their house all night and never left, but when confronted with other witness's statements he had left in a white truck that evening, Gonzalez replied that he was "too damn high" to remember what happened. Gonzalez said he and the Arana brothers were hanging out in front of their house when they heard a noise like firecrackers and they went inside. They remained there until they left for a friend's house at midnight, after which he got home about 1:30 a.m.

Detective Johnson told Gonzalez that police had found a rifle on the ground at the crime scene and then told Gonzalez that "if a guy pulled a gun and that's what happened, then it's self defense, but you need to tell me that, because I can't speculate" Gonzalez insisted he was not involved in the shooting and did not even know about it until he saw it the next day on the news. Detective Johnson asked him again, "At any time on Tuesday, May third, in the evening did you ever feel like your life was in danger or like you had to defend yourself, for the record?" Gonzalez replied, "No."

4. Gang evidence

District Attorney Investigator Joseph Winney testified that the graffiti found in Gonzalez's room was unique to members of the Varrio Clairemont gang and indicated that the person living in the room was a member. Moreover, he had met Gonzalez less than a month before the shooting when conducting a probation search of Marco Arana. At the time, Gonzalez identified himself as a Varrio Clairemont gang member.

Investigator Winney testified concerning gang structure, colors or articles of clothing used to identify gangs, gang rivalries, and gang members' motivation to commit crimes to increase their status within gangs.

Investigator Winney testified that if a person were to call out a West Side slogan or make that gang's sign to a Varrio Clairemont member, it would anger and provoke the Varrio Clairemont member into retaliating. He said it would be typical for the gang member to round up other members and return to punish the offender when that person was alone or otherwise vulnerable, and it would not be unusual for the confrontation to end in a shooting death.

5. Martin's lack of cooperation/fears of retaliation

Martin initially refused to cooperate with police, angry with them about his treatment after the shooting and his belief they had stole money and property from his backpack. He was also fearful of getting involved because he did not want to invite retaliation. He testified that when police asked him to look at photographic lineups, he pretended not to recognize anyone, even though he recognized Gonzalez as the shooter.

Months later, Martin changed his mind and decided to cooperate with police. He had been living on the streets of Clairemont and felt threatened. He asked for witness protection in exchange for his cooperation. At trial, he was still so frightened of retaliation that he initially refused to tell defense counsel the location of his drug rehabilitation program.

When defense counsel asked Martin if he testified in exchange for a promise to "hook [you] up," Martin responded, "That's a bald face lie." He pointed out that the

defense investigator offered him "a better deal" than the district attorney's office, including housing and a stipend, to try to "sway him in favor of [the defense]," but he refused.

An investigator testified Martin was relocated to a remote part of the county under the state's witness protection program and that the fund, which was separate from the district attorney's office, paid most of Martin's expenses directly so that Martin himself received only minimal amounts of cash. The last payment on Martin's behalf ended roughly a year before trial.

B. Defense Case

Toxicologist Darrell Clardy testified about the effects of methamphetamine on the body. Use of the drug, especially when accompanied by little sleep, impacts a person's ability to perceive an event. It can cause a person to see or hear things that did not actually happen, to confuse things, or to focus on certain things and nothing else. That person may have trouble processing and accessing the memory of the event and may include things that did not happen when recalling it, even if not under the influence at the time of recall. A chronic methamphetamine user under the influence of the drug would likely act irrationally, confused, or disoriented, and have a tendency toward violence and exhibit psychotic or paranoid behavior.

Gonzalez also called his father, Luciano, who testified he heard about the shooting on the news. Gonzalez was not home at the time, arriving at approximately 1:00 a.m. He did not seem upset or act unusually the next day. It did not trouble his father "at all" that his son's room was covered with gang graffiti. He believed Gonzalez was honest.

Gonzalez's mother and father did not have a landline at their house, and Gonzalez did not have a cell phone. His father and brother Jose had cell phones at the time, but Gonzalez would not typically use them. Jose testified that Gonzalez did not use his cell phone on May 3, 2005, or on the following days.

Defense investigator Michael Reyes spoke with Martin while he was in jail two times during the middle of 2006. Martin told him the district attorney's office "would help him set up for about two or three months to make a comfortable living after this whole case was finished." Reyes testified he thought it was "obvious" the district attorney's office was paying Martin's way in exchange for "winning the case with the DA." He admitted, however, that he did not actually ask why Martin was being housed out of town at government expense. He did not record his conversation with Martin. He denied offering Martin anything in exchange for his cooperation.

Brian Gilbert, an individual who was not a licensed investigator, but "work[ed] for" one, testified he interviewed Kelly Martinez three days before trial. He testified that Shaver came to her house the day after the shooting and told her that he and Ingram "tried to get the gun off [Tweedie] after [Tweedie] was shot to put the lock back on." Like Reyes, he did not record his conversation with Martinez. He also admitted that when he interviewed Martinez a year earlier, she did not mention this event, her sudden recollection of the event seemed odd, and he should have followed up on it but did not.

Martinez disagreed with Gilbert's testimony. She said that Shaver and Ingram had come to her house and talked about the shooting, but she could not recall the conversation in detail. When asked if she had recently told Gilbert that Shaver said they tried to take

the rifles off of Tweedie's body and engage the safety, she said, "No, I don't think I said that." Shaver also denied he said that to Martinez or handled the rifle after the shooting.

DISCUSSION

I. SUFFICIENCY OF THE EVIDENCE

Gonzalez asserts there is insufficient evidence to find him guilty of first degree murder or to support the true finding on the personal discharge of a firearm allegation because Martin had "credibility problems" and Rosa erred in describing the details of the shooting. This contention is unavailing.

A. Standard of Review

The critical inquiry on review of the sufficiency of the evidence is whether the record reasonably supports a finding of guilt beyond a reasonable doubt. "[T]his inquiry does not require a court to 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' [Citation.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) Thus, "[i]f the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." [Citations.] (*People v. Bean* (1988) 46 Cal.3d 919, 933; *People v. Stanley* (1995) 10 Cal.4th 764, 793.) A reviewing court must accord deference to the jury and

not substitute its evaluation of a witness's credibility for that of the fact finder. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

B. *Analysis*

Section 189 provides in relevant part, "All murder which is perpetrated by means of . . . willful, deliberate, and premeditated killing . . . is murder of the first degree."

Personal discharge of a firearm requires that the defendant himself intended to and did discharge a firearm, causing a death. (§ 12022.53, subd. (d).)

Gonzalez asserts that the evidence is insufficient to show he was the shooter. However, while attacking the credibility of Martin and Rosa, Gonzalez ignores the substantial evidence pointing to him as the shooter. Martin, an eyewitness to the shooting, identified Gonzalez as the shooter. Rosa wrote in a letter, and told a teacher's aide, that Gonzalez shot Tweedie. She later admitted to police that Gonzalez told her he had shot Tweedie, and she overheard him bragging about the shooting. Further, the forensic evidence of the three gunshot wounds to Tweedie, fired from one gun, supported Martin's claim Gonzalez was the shooter. Circumstantial evidence of Gonzalez's own actions following the shooting, including his fleeing to his godmother's house and hiding there for a week, were evidence of a consciousness of guilt. Gonzalez's inconsistent and false statements to police, were also probative of his guilt. Finally, Gonzalez's status as a member of Varrio Clairemont, and the fact one of the Looney Mob had beat up one of his fellow gang members earlier, supplied a motive for the shooting.

Gonzalez cites the "grave credibility problems" with Martin's testimony, including the fact he was high on methamphetamine and failed to pick out Gonzalez from a police

lineup. He also argues the inaccuracies in Rosa's letter as to how the shooting occurred and the fact she later changed her story when she talked to police rendered her testimony "unreliable."

However, the weight and credibility of Martin's and Rosa's testimony were matters for the jury to decide, which we may not reweigh on appeal: "In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

The jury in this matter heard the testimony of Martin and the evidence of Rosa's statements, as well as the other witnesses and evidence admitted at trial. To the extent there were weaknesses or inconsistencies in the evidence at trial, the jury resolved these doubts against Gonzalez. We may not question their credibility determinations and conclusion that Gonzalez was the shooter. Thus, substantial evidence supports his conviction for first degree murder and the allegation that he personally used a firearm in committing that crime.

II. *FAILURE TO INSTRUCT ON IMPERFECT SELF DEFENSE*

Gonzalez asserts the court violated his federal and state rights to due process and prevented him from presenting a defense by refusing to instruct the jury on imperfect self-defense. We conclude that the court did not err in refusing to give that instruction,

and, even if it did, it is not reasonably probable that he would have received a more favorable result if the instruction had been given.

A. Background

After both sides rested, jury instructions were discussed. The court agreed to instruct the jury on self defense, whereupon defense counsel stated, "I think the imperfect self-defense applies." The court responded, "Tell me how? [B]ecause there has to be some evidence to support the instruction." Defense counsel argued that Tweedie was high on a drug that can cause aggression and was talking "about blowing somebody down." He also argued that Tweedie "went to his left, pulling something up as if to draw a weapon," although Martin denied that occurred when he testified.

The court stated that, given the state of the evidence, the only way to justify an imperfect self-defense instruction would be for Gonzalez "to testify and say that he was acting in self-defense, which we don't have, and the facts [don't] support it." The court stated that imperfect self-defense "requires an actual, but unreasonable, belief [in] the necessity to defend oneself." The court opined that absent Gonzalez testifying to an "actual . . . belief" in the need to defend himself, it was "pure speculation" that he felt such a need.

The court ruled imperfect self-defense was not applicable, but invited defense counsel to provide authority supporting his position at the next court session. When discussion of jury instructions resumed the next day, defense counsel made no further argument on imperfect self-defense and did not submit any authority to the court.

B. *Analysis*

In a criminal case, the trial court has a sua sponte duty to instruct "on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' [Citations.] Included within this duty is the ' . . . obligation to instruct on defenses, . . . and on the relationship of these defenses to the elements of the charged offense . . . ' where ' . . . it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense . . . ' [Citation.]" (*People v. Stewart* (1976) 16 Cal.3d 133, 140.)

In *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082, the California Supreme Court explained the defenses of perfect and imperfect self-defense: "For killing to be in self-defense, the defendant must actually and reasonably believe in the need to defend. [Citation.] If the belief subjectively exists but is objectively unreasonable, there is 'imperfect self-defense,' i.e., 'the defendant is deemed to have acted without malice and cannot be convicted of murder,' but can be convicted of manslaughter. [Citation.] To constitute 'perfect self-defense,' i.e., to exonerate the person completely, the belief must also be objectively reasonable." (Fn. omitted.)

In this case there is no evidence in the record to support an imperfect self-defense instruction. All the evidence showed Gonzalez and his companions were the aggressors who approached Tweedie and shot him. There was no evidence presented that Gonzalez had any belief that he needed to defend himself, reasonable or unreasonable. Even if the

evidence could be construed to show that Tweedie was trying to pull a gun out from behind his back, it would only show that *he* was attempting to defend himself.

Further, to the extent the court erred in failing to instruct on imperfect self-defense, there is no reasonable probability that the jury would have convicted Gonzalez of manslaughter instead of first degree murder. The evidence was overwhelming that there was no imminent threat to Gonzalez's safety. Rather, all the evidence from eyewitnesses, and statements by Gonzalez himself, pointed only to his intentionally shooting Tweedie as an act of retaliation. He approached Tweedie, called out his gang affiliation, and then shot Tweedie three times. Afterwards, he bragged about shooting him. Accordingly, any error in failing to instruct on imperfect self-defense was harmless.

III. *ADMISSION OF EXPERT WITNESS GANG TESTIMONY*

Gonzalez contends the court erred in allowing District Attorney Investigator Joseph Winney to testify concerning gang structure, colors or articles of clothing used to identify gangs, gang rivalries, and gang members' motivation to commit crimes to increase their status within gangs. Gonzalez asserts much of the testimony was irrelevant and unduly prejudicial. This contention is unavailing.

A. *Background*

Prior to trial, Gonzalez filed a motion in limine seeking to exclude expert testimony concerning criminal street gangs. Gonzalez argued evidence of Gonzalez's membership in a gang would amount to improper disposition evidence. Gonzalez further argued gang evidence was improper because the People had not charged Gonzalez with a gang enhancement allegation.

The court held a series of hearings on the admissibility of gang evidence. During the first hearing, the prosecutor argued that Winney's testimony was relevant to explain why the shooting took place, i.e., that it was gang-motivated. Defense counsel argued it was highly prejudicial and would demonstrate a predisposition of Gonzalez to commit criminal activity. The court tentatively indicated that most of the gang evidence was admissible, but agreed to hold an Evidence Code section 402 hearing on the issue.³

At the Evidence Code section 402 hearing, Winney explained what he would testify to at trial, including general information about gang structure, emerging versus established gangs, gang signs, gang rivalries, and tagging crews. After his testimony, the prosecutor argued the testimony was relevant to explain the circumstances surrounding the shooting and Gonzalez's motive to commit the shooting. Defense counsel argued the evidence lacked foundation as very little of it was tied to Gonzalez's actions in this case.

The court ruled that the gang evidence was admissible, and the extent of the allowable testimony would depend on what evidence was introduced at trial. The court found that as long as the prosecution introduced evidence that made Winney's testimony relevant and useful, the gang evidence would be admissible.

Winney was one of the last witnesses to testify. At the time of his testimony, all of the percipient witnesses had testified about numerous matters concerning Varrio Clairemont and its rivals including, gang nicknames, gang-on-gang violence, fear of

³ Evidence Code section 402, subdivision (b) provides that "[t]he court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury"

retribution, bragging about acts of violence, graffiti, clothing worn by gang members, and gang slogans being shouted and gang signs being made. Winney detailed his experience with gangs while a law enforcement officer. He then testified concerning the structure and habits of Southern California Latino gangs, retaliation for perceived disrespect, evolution of tagging crews into gangs, emerging gangs, aspects of Varrio Clairemont and its rivals, evidence Gonzalez was a Varrio Clairemont member, and a motive for Tweedie's shooting: the throwing of a gang sign or shouting a gang slogan.

B. Standard of Review

The decision of a trial court to admit expert testimony " 'will not be disturbed on appeal unless a manifest abuse of discretion is shown.' " (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299.) That exercise of discretion is not grounds for reversal unless " 'the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " [Citation.]" (*People v. Ochoa* (2001) 26 Cal.4th 398, 437-438, disapproved on other grounds in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14.)

C. Applicable Authority

A witness is qualified to testify as an expert if the witness has "special knowledge, skill, experience, or education pertaining to the matter on which the testimony is offered." (*People v. Mendoza* (2000) 24 Cal.4th 130, 177.) Expert opinion testimony is admissible if the subject matter of the testimony is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a); see also *People v. Gardeley* (1996) 14 Cal.4th 605, 617.) Further, " 'the admissibility of expert

opinion is a question of degree. The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission; if that were the test, little expert opinion testimony would ever be heard. Instead, the statute declares that even if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would "assist" the jury. It will be excluded only when it would add nothing at all to the jury's common fund of information, i.e., when "the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness." ' [Citation.]" (*People v. McAlpin, supra*, 53 Cal.3d at pp. 1299- 1300.)

Matters beyond the common experience of jurors, such as the culture and habits of criminal street gangs, are properly the subject of expert testimony. (*People v. Gardeley, supra*, 14 Cal.4th at p. 617; see also *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464 [expert testimony concerning individual's gang membership proper].) Expert testimony may address "the size, composition or existence of a gang [citations], gang turf or territory [citations], an individual defendant's membership in, or association with, a gang [citations], the primary activities of a specific gang [citations], motivation for a particular crime, generally retaliation or intimidation [citations], whether and how a crime was committed to benefit or promote a gang [citations], rivalries between gangs [citation], gang-related tattoos, gang graffiti and hand signs [citations], and gang colors or attire [citations]." (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 657, fns. omitted.)

D. Analysis

Here, the court did not err in admitting Winney's gang testimony. It assisted the jury by explaining a motive for Gonzalez's shooting of Tweedie. It was relevant to show

that Ingram and his associates could be targeted for retribution for beating up a Varrio Clairemont member and also for merely making a gang sign as members of Varrio Clairemont drove by. It explained the particular structure of the groups involved in the shooting and their rivalry. It is "difficult to imagine a clearer need for expert explication than that presented by a subculture in which this type of mindless retaliation promotes 'respect.' " (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1384.)

Moreover, any prejudice that resulted from the introduction of this evidence was far outweighed by its relevance. "The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." '[Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

Finally, the court instructed the jury on the limited purpose for which the jury could consider the gang evidence:

"You may consider evidence of gang activity only for the limited purpose of deciding whether the defendant had a motive to commit the crime charged, the defendant actually believed in the need to defend himself, the defendant acted in the heat of passion, and the defendant was the person who committed the crime charged. You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the fact and

evidence relied upon by an expert witness in reaching his or her opinion. You may not consider this evidence for any other purpose. [¶] You may not conclude from the evidence that the defendant is a person of bad character or that he has a disposition to commit crimes."

We presume the jury heeded this instruction. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.)

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

McDONALD, J.